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No.

In the Supreme Court of the United States

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G. individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,
Appellants

v.

CONSOLIDATED RAIL CORPORATION,
Appellee

On Appeal From the United States Court of Appeals for the Third Circuit.

JURISDICTIONAL STATEMENT

CHARLES F. HOFFMAN
Chief Counsel
JOHN J. GALLAGHER
Assistant Counsel
Attorneys for Appellants
Pennsylvania Public Utility Commission
G-28 North Office Building
Harrisburg, PA 17120
(717) 787-5000

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

QUESTIONS PRESENTED

I. Does the Boiler Inspection Act prempt the states from enforcing legislation requiring devices which are purely experimental in nature?

II. Has the F.R.A. issued a rule, regulation, order or standard covering the same subject matter as 66 Pa. C.S. §2705?

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JURISDICTIONAL STATEMENT
IN THE SUPREME COURT OF THE UNITED STATES

No.——

PENNSYLVANIA PUBLIC UTILITY COMMISSION: SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission, CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

v.

CONSOLIDATED RAIL CORPORATION

Appellees

On Appeal From the United States Court of Appeals for the Third Circuit.

JURISDICTIONAL STATEMENT

Appellants Pennsylvania Public Utility Commission, Susan M. Shanaman, Chairman, James H. Cawley, Commissioner, Michael Johnson, Commissioner, Linda C. Taliaferro, Commissioner, John G. Alford, Director of Safety and Compliance and John B. Wilson, Director of Operations bring this appeal from the order and final judgement entered on November 16, 1982 by the United States Court of Appeals for the Third Circuit which affirmed the lower court's opinion which held that section 2705 of the Pennsylvania Public Utility Code (66 Pa. C.S. §2705) conflicted with federal law in violation of Article VI Clause 2 of the Constitution. Section 2705 of the Pennsylvania Public Utility Code provides that locomotives operating within the state must be equipped with speedometers and speed recorders.

This appeal presents a substantial federal question of federal-state relations which merits plenary review. Appellants respectfully request this Court to note jurisdiction and permit the filing of briefs and the presentation of oral argument on the substantial question presented.

CITATION TO OPINION BELOW

The opinion of the District Court is reported at 536 F. Supp. 653 (E.D. Pa. 1982). The appellate Court for the reasons set forth in the District Court opinion affirmed without separate opinion. The final order of the appellate Court is not published but is included in the appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254 (2) in that this appeal is taken from an order by the Court of Appeals holding that a state statute (66 Pa. C.S. §2705) was invalid as repugnant to the Constitution and Laws of the United States. This appeal is timely in that this action was filed August 11, 1980, the decision of the Court of Appeals entered November 16, 1982, and the final order of the Court of Appeals was entered December 13, 1982. This appeal was taken on February 10, 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

66 Pa. C.S. §2705 as amended 1978, November 26, P.L. 1241, No. 294, effective in 60 days, is the statute whose validity is involved in this action. The pertinent subsection is set forth below and the entire Section is set forth in the Appendix.

§2705. Speedometers and speed recorders

(a) General rule — No railroad locomotive shall be operated in excess of 30 miles per hour in this Commonwealth without a device or devices making a record of the speed at which the locomotive is traveling and providing the engineer or operator of the locomotive with a view of such speed. Both devices shall be functioning correctly within four miles per hour.

Boiler Inspection Act, 45 U.S.C. §§23-34 (1976). The pertinent section is set forth below.

§23. Use of unsafe locomotive and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of

sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Feb. 17, 1911, c. 103, §2, 36 Stat. 913; Mar. 4, 1915, c. 169, §1, 38 Stat. 1192, June 7, 1924, c. 355, §2, 43 Stat. 659.

Federal Railroad Safety Act, 45 U.S.C. §434. The pertinent section is set forth below.

§434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. Pub. L. 91-458, Title II, §205, Oct. 16, 1970, 84 Stat. 972.

STATEMENT OF THE CASE

On August 11, 1980, Consolidated Rail Corporation, hereinafter referred to as "ConRail", brought suit in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of Pennsylvania's Speedometer and Speed Recorder Law, 66 Pa. C.S. §2705 as amended 1978, November 26, P.L. 1241, No. 294.[1]

Suit was filed against the Pennsylvania Public Utility Commission, hereinafter referred to as "PUC", the Commissioners of the PUC in their official and individual capacity and the Directors of Safety and Compliance and of Operations of the PUC in their official and individual capacity.

ConRail challenged the constitutionality of 66 Pa. C.S. §2705, asserting that the Pennsylvania law, if enforced, would be contrary to federal law,[2] has been preempted by said federal law and furthermore, violates the Supremacy Clause[3] and the Fourteenth Amendment of the United States Constitution.

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[1] Requires railroad locomotive operated in execess of 30 miles per hour in the Commonwealth of Pennsylvania, not operated exclusively within designated yard limits in switching or transfer service, to be equipped with speedometers and speed recorders.

[2] Boiler Inspection Act, 45 U.S.C. §§22-34 Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* Federal Railroad Safety Act, 49 U.S.C. §434.

[3] U.S. Const. Art. VI, Clause 2.

On September 4, 1980 a motion to dismiss was filed by the PUC on the grounds that the complaint failed to show the existence of an actual controversy between the parties as required by Article III of the United States Constitution and Section 2201 of the Judicial Code, Title 28. PUC had not at any time initiated enforcement proceedings against ConRail under §2705. In fact, a determination has never been made by the PUC that ConRail was not in substantial compliance with 66 Pa. C.S. 2705.

The District Court granted plaintiff's motion for summary judgement. The PUC immediately appealed to the United States Court of Appeals for the Third Circuit, which affirmed the District Court and entered final judgement on November 16, 1982, without delivering an opinion. Petition for rehearing was denied December 13, 1982.

In the District Court's opinion, on which the appellate Court relied, the Court held that the Pennsylvania law was preempted by the Federal Railroad Safety Act based on a determination (without benefit of legal authority) that speedometers and speed recorders were the same "subject matter".[4] In addition, the Court held that the Pennsylvania Law was preempted by the Boiler Inspection Act based on a determination (without benefit of legal authority) that a speed recorder is an appurtenance.[5]

On February 10, 1983, the Public Utility Commission initiated this appeal.

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[4] See p. 3a, infra.

[5] See p. 3a, infra.

THE QUESTION IS SUBSTANTIAL

I. Does the Boiler Inspection Act preempt the States from enforcing legislation requiring devices which are purely experimental in nature?

The state statutory provisions found by the Court below to be unconstitutional provide essentially that all locomotives operating in the Commonwealth of Pennsylvania be equipped with speed recorders. The Court below relied on the reasoning of the District Court which held that since the state statute regulated locomotive equipment, it was therefore preempted by the Boiler Inspection Act.

The Court below assumed that this Court's decision in *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926), clearly delineated all of the parameters of the Boiler Inspection Act. However, it disregarded this Court's decision in *Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936), which held that experimental devices were not devices which fell within the scope of the Boiler Inspection Act. It is impossible to conceive that Congress in 1915 as it amended the Boiler Inspection Act thought to encompass sophisticated experimental devices such as speed recorders within the purview of the Act. As stated by the F.R.A. at 44 Fed. Reg. 29610, "the state of the art for locomotive speed recorders has yet progressed to a point in which it is practical to mandate their universal application". Therefore, speed recorders, by their experimental nature, cannot be considered a part of the locomotive or its appurtenances under Section 23 of the Boiler Inspection Act, and, therefore, are not preempted from regulation by the States.

It is, therefore, necessary that this Court note jurisdiction in this case to resolve the questions herein raised which are fundamental to the basic concepts of federalism embodied in our Constitution.

II. Has the F.R.A. issued a rule, regulation, order or standard covering the same subject matter as 66 Pa. C.S. §2705?

The express language of Section 205 of the Federal Rail Safety Act permits a state regulation to stand until the Secretary of the F.R.A. has acted relative to the precise subject matter covered by the state regulation.

The regulations promulgated on March 31, 1980 by the F.R.A. at 49 C.F.R. Part 229, §229.117 states:

> (a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a *speed indicator.* (Emphasis supplied.)

As is clearly indicated, speed recorders are not included in the regulation. The F.R.A. discussion of speed recorders (Federal Register, Vol. 44, No. 99, pp. 29610-29611) is an unambiguous statement that the Administration has currently chosen not to regulate on this subject. It belies common sense that such language can be interpreted to mean that the F.R.A. has indeed promulgated anything in regard to speed recorders within the parameters of §205 of the Federal Rail Safety Act.

The Court below relying again on the District Court's reasoning failed to note the significant difference between a speed recorder and a speedomoter and, therefore, held

that regulation of both devices is regulation of the same subject matter—speed indication or speed control. A speedometer or speed indicator is a relatively simple device which gives an observer or operator a continuous reading of a vehicle's velocity. A locomotive speed recorder on the other hand is a rather sophisticated device employing the use of an electromagnetic encoder to imprint on a tape magnetic signals, which when decoded by the proper equipment, can indicate a vehicle's relative speed, location, throttle position, brake application, and whether the horn has been sounded. The Court nevertheless held that regulation of both devices is regulation of the same subject matter—speed indication or speed control. This holding is completely without legal precedent. The District Court cited its own dicta in *Adkins v. Dirickson,* 523 F. Supp. 1281, 1283 (E.D. Pa. 1981), for the proposition that a speed recorder in essence is a recording speedometer. As a result, the Court below erred in adopting the District Court's reasoning in this regard.

It is essential that the Commonwealth of Pennsylvania continue to enforce the provisions of 66 Pa. C.S. §2705 requiring the use of speed recorders on locomotives operating within the Commonwealth for the continued protection of the involved employees of Conrail and state residents. For this reason and previously mentioned concepts of Federalism, it is strongly urged that this Court review the opinion in this case.

CONCLUSION

Based upon the foregoing arguments and authorities, it is requested that this Court note jurisdiction in this appeal, receive full briefs on the merits, and hear oral arguments in order to resolve the substantial questions which are involved.

JOHN J. GALLAGHER
Assistant Counsel
CHARLES F. HOFFMAN
Chief Counsel
Attorneys for Pennsylvania
Public Utility Commission

G-28 North Office Building
P.O. Box 3265
Harrisburg, PA 17120
(717) 787-5000

IN THE SUPREME COURT OF THE UNITED STATES

No.——

PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL.

Appellants

v.

CONSOLIDATED RAIL CORPORATION,

Appellees

I, JOHN J. GALLAGHER, Assistant Counsel for the Pennsylvania Public Utility Commission, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date March 11, 1983, three copies of Appellants' Jurisdictional Statement and Appendix to the persons listed below:

Henry H. Perrett, Jr., Esquire
Hermon M. Wells, Esquire
John R. Jenchura, Esquire
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Thomas P. Shearer, Esquire
711 Frick Building
Pittsburgh, PA 15219

I further certify that all parties required to be served in this appeal have been served.

JOHN J. GALLAGHER
Assistant Counsel

APPENDIX A

§2705. Speedometers and speed recorders

(a) General rule.—No railroad locomotive shall be operated in excess of 30 miles per hour in this Commonwealth without a device or devices making a record of the speed at which the locomotive is traveling and providing the engineer or operator of the locomotive with a view of such speed. Both devices shall be functioning correctly within four miles per hour.

(b) Exceptions.—Locomotives operated or used exclusively within designated yard limits in switching or transfer service need not be equipped in accordance with the provisions of this section. Locomotives while being used in commuter passenger service need not be equipped with a speed recording device.

(c) Notification of compliance.—Each railroad shall notify the commission of the date that each locomotive comes into compliance with the provisions of this section. The notification shall state the serial number or other identification of the locomotive.

(d) Schedule of regulated locomotives.—Each railroad affected by the provisions of this section shall maintain at a designated location a list or schedule of the locomotives referred to in this section. It shall set forth, along with other information, the date that the device or devices referred to in subsection (a) were calibrated and found to be functioning in accordance with the provisions of this section. It shall advise the commission as to such location.

In the event of an accident during the operation of a locomotive or in the event of a disciplinary proceeding in which a railroad employee is charged with excessive speed, the record required by this section showing the speed at the time and place involved shall be retained by the railroad, at a location made known to the Public Utility Commission, until permission to destroy them has been granted by the commission or otherwise permitted in accordance with a rule, regulation or order of the commission. In any disciplinary proceeding in which a railroad employee is charged with excessive speed in the operation of a locomotive equipped with a speed recorder the railroad may not introduce other evidence of such speed unless the record has been retained in compliance with this subsection.

(e) Enforcement.—The commission shall enforce the provisions of this section and may issue such order or orders as may be proper to require compliance therewith. 1978, July 1, P.L. 598, No. 116, §2705, effective in 60 days. As amended 1978, Nov. 26, P.L. 1241, No. 294, effective in 60 days.

1978 Amendment: In fourth sentence of subsection (d), substituted phrase "until permission to destroy . . . order of the commission." for "for a period of six months after said accident or disciplinary proceeding."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 80-3147

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
et al.

MEMORANDUM

GILES, J., APRIL 14, 1982

By statute, Pennsylvania requires locomotives to have speed records and indicators. 66 Pa. Cons. Stat. §2705 (1978).[1] Plaintiff railroad, contending that the statute is

[1] That section states that:

No railroad locomotive shall be operated in excess of 30 miles per hour in this Commonwealth without a device or devices making a record of the speed at which the locomotive is traveling and providing the engineer or operator of the locomotive with a view of such speed. Both devices shall be functioning correctly within four miles per hour.

preempted by federal law, sues the state[2] for a declaration that the statute is unconstitutional under the supremacy clause, U.S. Const. art. VI, cl. 2. Before me is plaintiff's motion for summary judgment. For the reasons which follow, the motion is granted.

The railroad contends that the state statute conflicts with two federal statutes, the Locomotive Boiler Inspection Act, 45 U.S.C. §23 (1976), and the Federal Railroad Safety Act, *id.* §434, and a federal regulation, 49 C.F.R. §229.117 (1980). The railroad argues that the Locomotive Inspection Act totally preempts the field of locomotive equipment, barring any state regulation of that subject. Alternatively, the railroad argues that the state statute is independently preempted by the test of the Railroad Safety Act, because a federal rule covers the same subject matter as the state statute.

The state argues that Congress has redistributed railroad regulatory authority so that the total-preemption test of the Locomotive Inspection Act is no longer valid. It contends that the correct tests are those stated in the Railroad Safety Act. State regulation of speed recorders allegedly meets those tests because it does not cover the same subject matter as the federal regulation, or, if it does over-

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66 Pa. Cons. Stat. §2705(a) (1978). Other subsections: require railroads to notify the state Public Utility Commission, and keep records, of compliance, *id.* §(b)-(c); give rules for evidentiary use of speed records in disciplinary hearings, *id.* §(c); and give enforcement powers to the Commission, *id.* §(d).

I note that because the statute exempts yard and commuter locomotives, *id.* §(b), it would not help reconstruct commuter-rail accidents.

[2] The named defendants are the Pennsylvania Public Utility Commission (the state body charged with enforcing the statute), its commissioners, and some of its officials.

lap, because it comes within the statutory exception of the Railroad Safety Act.[3]

I. LOCOMOTIVE INSPECTION ACT

In the landmark *Napier* case, the Court held that Congress intended the Locomotive Boiler Inspection Act to occupy totally the field of locomotive equipment.[4] The

[3] The state does not defend its regulation of speed indicators, presumably because preemption is obvious. *Compare* 66 Pa. Cons. Stat. §2705(a) (quoted in note 1 *supra*) *with* 49 C.F.R. §229.117 (a) (quoted in note 16 *infra*).

I note that the cause of action arises under the Declaratory Judgment Act, 28 U.S.C. §2201, and that jurisdiction exists under 28 U.S.C. §1331. Plaintiff has standing because it would suffer legal "injury" if the state law were enforced. Despite the absence of a specific statutory penalty, the action is ripe because of the possibility of enforcement of the law under 66 Pa. Cons. Stat. §§502 & 503, and because the only factual development needed for adjudication is the minimal amount supplied by the parties. Plaintiff is a "common carrier" as defined in the Locomotive Inspection Act, *see* 45 U.S.C. §22, and a "railroad" subject to the Railroad Safety Act, *see id.* §434; S. Rep. No. 91-619, 91st Cong., 1st Sess. 6 (1969). Plaintiff is covered by, and in violation of, the state statute. *Pullman*-type abstention is inappropriate because the state statute's meaning and validity under state law are undisputed. Finally, *Younger*-type abstention is inappropriate because there are no ongoing state enforcement proceedings. *See also* Memorandum (Nov. 12, 1980) (denying motion to dismiss for lack of subject-matter jurisdiction).

[4] In *Napier*, the Court invalidated state regulations of locomotive equipment. The Court decided that the regulations were valid exercises of the states' police power, and assumed that there was no actual conflict between state regulations and federal law. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 610-11 (1926)

Act, by itself, thus preempts state regulation of locomotive equipment. The state concedes that this was Congress's intent in passing the Locomotive Inspection Act.[5] The state, however, argues that "the rule of *Napier* . . . has been abrogated" by the Federal Railroad Safety Act, 45 U.S.C. §434. *See* State's Brief, *supra* note 5, at 2. Thus, the question whether the state statute is preempted by the Locomotive Inspection Act turns on whether the latter act's preemptive purpose was modified by the Railroad Safety Act.

Prior to passage of the Railroad Safety Act, federal law governed only a few areas of railroad safety. Congress found that this spotty federal coverage resulted in numerous preventable accidents. To remedy this problem it passed the Federal Railroad Safety Act. The Act aimed to

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(Brandeis, J.). The validity of the state regulations thus hinged on the answer to the question: "Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment?" *Id.* 611. The Court answered that "the power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* Thus, the Act, even absent exercise of federal regulatory power "was intended to occupy the field." *Id.* at 613; *accord, Norfolk & W. Ry. v. Brotherhood of Locomotive Eng'rs*, 459 F. Supp. 136, 144 (W.D. Va. 1978); *see Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 n. 2 (1960).

Regulatory authority under the Act since has been transferred from the ICC to the Secretary of Transportation. *See* 45 U.S.C. §28; 49 U.S.C. §1655(e)(1)(E). I also note that the Act is variously known as the "Locomotive Boiler Inspection Act," the "Boiler Inspection Act," and the "Locomotive Inspection Act." I shall use the last term.

[5] *See* Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 1 [hereinafter cited as State's Brief].

promote railroad safety by insuring "broad Federal regulatory authority over all areas of railroad safety,"[6] and promoting "nationally uniform" railroad-safety standards.[7] While expanding the field for federal regulation, Congress also stated a narrower rule governing preemption of state law.[8] The state contends that this rule operates to limit the scope of preemption of the Locomotive Inspection Act.

That a reasonably strong argument exists in favor of the state's position is shown by Justice Roberts' opinion in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 118-23, 413 A.2d 1037, 1042-44 (1980) (state law requiring flush toilets in locomotives not preempted by Locomotive Inspection Act because Railroad Safety Act changes preemption test). I, however, disagree with the state's argument for two reasons. First, the legislative history of the Railroad Safety Act shows that Congress intended no change to the Locomotive Inspection Act. Second, elimination of the total-preemption test for locomotive equipment runs contrary to the purpose of the Railroad Safety Act.

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[6] H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 11, [hereinafter cited as H. Rep.], *reprinted in* 1970 U.S. Code Cong. & Ad. News 4104, 4108; *see* 45 U.S.C. §421 ("promote safety in all areas of railroad operations"); H. Rep., *supra*, at 7-8, 73, 75, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4105, 4127, 4129; S. Rep. No. 91-619, 91st Cong., 1st Sess. 1, 5-6 (1969) [hereinafter cited as S. Rep.].

[7] 45 U.S.C. §434; *see, e.g., National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1111 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); H. Rep., *supra* note 6, at 19, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4116-17; S. Rep., *supra* note 6, at 8-9, 19.

[8] That rule comprises 45 U.S.C. §434. *See* note 15 *infra* & accompanying text.

In passing the Railroad Safety Act, Congress could have repealed the Locomotive Inspection Act, or recodified or subsumed it within the comprehensive Railroad Safety Act.[9] Instead, Congress concluded that the Locomotive Inspection Act was working well, and specifically determined to keep it independently in force "without change."[10] These decisions negate implied modification of any part of the Locomotive Inspection Act, including its total occupation of the locomotive-equipment field.[11]

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[9] *See, e.g.*, S. Rep., *supra* note 6, at 11, 24 (proposed S. 1933, 91st Cong., 1st. Sess. §107 (1969), would have repealed miscellaneous railroad-safety laws); *id.* at 16 (letter from Sec'y of Transp. James M. Beggs to Sen. Warren G. Magnuson (Dec. 2, 1969), recommending deferred repeal of Locomotive Inspection Act).

[10] As stated in the House Report:

> Over the years there have been several enactments of legislation dealing with certain phases of railroad safety. These include, among others . . . [the] Locomotive Inspection Act. . . .
>
> They are set forth in appendix B of this report. These particular laws have served well. In fact the committee chose to continue them without change.

H. Rep., *supra* note 6, at 7-8, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4105; *see* S. Rep., *supra* note 6, at 11.

[11] *See e.g., TVA v. Hill*, 437 U.S. 153, 189-90 (1978) (disfavor of implied repeal is cardinal rule, intent to repeal must be clear and manifest); *United States v. United States Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976) (disfavor of repeal by implication carries special weight when argument is that general statute repealed specific one).

The continued independent vitality of the Locomotive Inspection Act is shown by the fact that the regulations cited in this case were adopted under the substantive and regulatory authority of that Act, 45 U.S.C. §§22-23 & 28. *See* 49 C.F.R. preceding

In expanding the scope of federal rule-making authority in the Railroad Safety Act, Congress allowed the states to continue regulating until displaced by federal rules in the same area.[12] The continued validity of state rules in areas that had always been subject to state regulation does not make railroad regulation less uniform than in the past. Thus, the new preemption rule, as applied to new areas of federal railroad regulatory jurisdiction, does not impair the congressional purpose of uniform regulation.

In contrast, in areas already governed by the Locomotive Inspection Act, the states had no regulations. If the Railroad Safety Act were to change the preemption test for those areas, the states could expand their regulatory authority, allowing a new reservoir of differing, and possibly incompatible, railroad-safety law.[13] This would run counter

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§229.1; 45 Fed. Reg. 21,092, 21,110 (1980) (adoption of final rule); 44 Fed. Reg. 29,605-06 (1979) (notice of proposed rulemaking). In contrast, the advance notice of proposed regulation invoked also the authority of the Railroad Safety Act, 45 U.S.C. §431. *See* 39 Fed. Reg. 4930 (1974).

I also note that under the authority of the Locomotive Inspection Act, the Federal Railroad Administration decided not to require speed recorders. 44 Fed. Reg. 29,610-11 (1979); *see* note 19 *infra* & accompanying text.

[12] *See* 45 U.S.C. §434; H. Rep., *supra* note 6, at 11, 19, 75, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4108-09, 4116-17, 4130; note 15 *infra* & accompanying text.

[13] *Cf., e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981), *and Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (differing state rules on truck length); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (incompatible state rules on shape of trailer mudguards); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773-75 (1945) (differing state rules on train length).

to Congress's purpose of uniform national regulation.[14] It is contrary to Congress's purpose in passing the Railroad Safety Act to allow the states to reoccupy fields from which they previously had been displaced. Thus, I conclude that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act.

The state statute regulates locomotive equipment, an area totally preempted by the Locomotive Inspection Act. Therefore, to the extent that the state is attempting to regulate railroad common carriers within the jurisdiction of the Interstate Commerce Commission, *see* 45 U.S.C. §22, the state statute conflicts with federal law and violates the supremacy clause.

II. FEDERAL RAILROAD SAFETY ACT

Even assuming, however, that the proper test for preemption is that stated in the Railroad Safety Act, the Pennsylvania statute is still preempted. The Railroad Safety Act allows state railroad-safety regulation of areas not covered by the "subject matter" of a rule adopted by the federal government. Furthermore, a state may regulate railroad safety in the same area as the federal government if the

[14] *Cf. Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D. N.Y. 1964) (*Napier* "decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.") (Friendly, J.) (three-judge court), *appeal dismissed*, 382 U.S. 111 (1965) (no direct appeal to Supreme Court), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert denied*, 385 U.S. 1036 (1967).

state rule relates to "an essentially local safety hazard" and meets other conditions.[15]

The Federal Railroad Administration has adopted a rule governing speed indicators in locomotives.[16] That rule requires locomotives to be equipped with speedometers. Because the rule does not require speed recorders, *compare* note 16 *supra* (federal rule), *with* note 1 *supra* (state statute), the state argues that its statute does not cover the same "subject matter" as the federal rule. Furthermore,

---

[15] The exact language of the preemption section is:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the same subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434.

[16] The rule provides:

> (a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a speed indicator which is—
>
> (1) Accurate within ±3 miles per hour of actual speed at speeds of 10 to 30 miles per hour and accurate within ±5 miles per hour at speeds above 30 miles per hour; and
>
> (2) Clearly readable from the engineer's normal position under all light conditions.

49 C.F.R. §229.117(a) (1980). Subsection (b) provides for testing the speedometer as soon as possible after departure.

the state contends that even if the subject matter is identical, the state law fits within the local-safety-hazard exception.

A speed recorder, "[i]n essence, . . . is a recording speedometer."[17] The speedometer and speed recorder often are incorporated in the same device, a fact recognized by the state statute.[18] Federal regulators thought speedometers and speed recorders belonged to the same subject matter. The Federal Railroad Administration discussed proposed speedometer and speed-recorder regulation under the same heading. *See* 39 Fed. Reg. 4929 (1974) (advance notice of proposed rulemaking).[19] This view of both devices as part of a unitary subject was shared by the Pennsylvania legislature, which regulated speedometers and speed recorders in the same sentence of the statute. *See* 66 Pa. Cons. Stat. §2705(a); note 1 *supra*. I hold that regulation of speedometers and speed recorders is regulation of the same "subject matter"—speed indication or speed control. Because state and federal rules cover the same area, the Railroad Safety Act preempts the state law unless it is saved by the local-hazard exception.

The state statute, however, does not relate to a local safety hazard and makes no attempt at localization. On its face, the statute does not relate to a local problem. Speed indication, speed recording, and accident reconstruction

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[17] *Adkins v. Dirickson*, 523 F. Supp. 1281, 1283 (E.D. Pa. 1981), *appeal docketed*, No. 82-1108 (3d Cir. Feb. 24, 1982); *see* Conrad, *The Tachograph As Evidence of Speed*, 8 Wayne L. Rev. 287, 288-91 (1962).

[18] *See* 66 Pa. Cons. Stat. §2705(a) (requiring "a device or devices"); note 1 *supra; see also* sources cited in note 17 *supra*.

[19] The proposed recorder regulations later were dropped. 44 Fed Reg. 29,610-11 (1979) (notice of rulemaking).

generally affect interstate commerce and are national problems subject to national regulation. *See, e.g.*, 44 Fed. Reg. 29,610-11, 29,617 (1979); 39 Fed. Reg. 4929 (1974).

The state, however, argues that even if the law is not local in its language, it is local in intent and effect. The local hazard that the legislature intended to minimize is an allegedly unique, statewide problem resulting from the presence of hundreds of miles of high-speed railroad lines. *See* State's Brief, *supra* note 5, at 9. It is recognized that these high-speed lines cross Pennsylvania's borders and form part of the northeast corridor rail system. In *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir. 1976), the state also argued that a statewide hazard was local. There, plaintiffs (including the Pennsylvania Public Utility Commission, *see id.* at 12), challenged preemption of state accident-reporting requirements by federal regulations. One argument advanced by plaintiffs was that statewide requirements were "expressly excepted under the savings clause of Section 434." *Id.* at 14. That argument was "devoid of merit" then, *id.*, and is devoid of merit now.[20] Therefore, I hold that the state statute is not exempt from preemption under the Railroad Safety Act.

---

[20] For instance, the House Report states: "Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter." H. Rep., *supra* note 6, at 19, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4117; *see National Ass'n of Regulatory Util. Comm'rs*, 542 F.2d at 14-15.

III. CONCLUSION

It would be constitutionally impermissible to apply 66 Pa. Cons. Stat. §2705 to railroads, such as plaintiff, which are subject to federal jurisdiction under the Locomotive Inspection Act or the Railroad Safety Act.

An appropriate order follows.

JUDGMENT

AND NOW, this 13th day of April, 1982, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED.

2. JUDGMENT hereby is entered in favor of plaintiff and against defendants.

3. It is declared that 66 Pa. Cons. Stat. §2705 (1978) is preempted by 45 U.S.C. §23 (1976), and by 45 U.S.C. §434 (1976) and 49 C.F.R. §229.117 (1980), and therefore, as applied to plaintiff, violates the supremacy clause, U.S. Const. art. VI, cl. 2.

BY THE COURT:

(s) James T. Giles

J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1313

CONSOLIDATED RAIL CORPORATION

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission

Pennsylvania Public Utility Commission,

Appellant

Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 80-3147)

Argued

November 16, 1982

Before: ALDISERT, SLOVITER, AND ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable James T. Giles in *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, No. 80-3147 (E.D. Pa. April 14, 1982); it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,
(s) Aldisert
Circuit Judge

Attest:
(s) N. Elizabeth Ferguson
Chief Deputy Clerk

DATED: November 16, 1982

APPENDIX D

United States Court of Appeals
For the Third Circuit

No. 82-1313

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission

Pennsylvania Public Utility Commission,

Appellant

(E.D. Pa. Civ. No. 80-3147)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) Aldisert
Judge

Dated: DEC 13 1982

APPENDIX E

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, Pa. 17120

February 10, 1983

In Reply Please
Refer to Our File

Sally Mrvos, Clerk
U.S. Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
ET AL.

CIVIL ACTION NO. 82-1313

Dear Ms. Mrvos:

Please find enclosed pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States a

copy of the Pennsylvania Public Utility Commission's Notice of Appeal in the above-captioned case.

Very truly yours,
(s) John J. Gallagher
John J. Gallagher
Assistant Counsel

JJG:wm
Enclosure

UNITED STATES COURT OF APPEALS
For the Third Circuit

CIVIL ACTION
No. 82-1313

CONSOLIDATED RAIL CORPORATION

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Pennsylvania Public Utility Commission, defendant, hereby appeals to the United States Supreme Court pursuant to 28 U.S.C. §1254 (2) from the judgement order of the United States Court of Appeals for the Third Circuit, entered November 16, 1982 (petition for rehearing denied December 13, 1982) affirming the judgement of the United States District Court for the Eastern District of Pennsylvania.

(s) John J. Gallagher
John J. Gallagher
Assistant Counsel
Charles F. Hoffman
Chief Counsel
Attorneys for Pennsylvania
Public Utility Commission

G-28 North Office Building
P.O. Box 3265
Harrisburg PA 17120
(717) 783-2840

DATED: February 10, 1983

CERTIFICATE OF SERVICE

I hereby certify that I am, this 10th day of February, 1983 serving by first class mail, postage prepaid, a copy of the foregoing Notice of Appeal of the Pennsylvania Public Utility Commission upon the persons listed below:

Henry H. Perrett, Jr., Esquire
Hermon M. Wells, Esquire
John R. Jenchura, Esquire
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Thomas P. Shearer, Esquire
711 Frick Building
Pittsburgh, PA 15219

(s) John J. Gallagher
John J. Gallagher
Assistant Counsel

Dated at Harrisburg, Pennsylvania
this 10th day of February, 1983.

Office-Supreme Court, U.S.
FILED
APR 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

v.

CONSOLIDATED RAIL CORPORATION,

Appellee

On Appeal From the United States Court of Appeals for the Third Circuit

APPELLEE'S MOTION TO AFFIRM

HERMON M. WELLS
JOHN R. JENCHURA
1138 Six Penn Center
Philadelphia, Pa. 19104
(215) 977-5019

Counsel for Appellee Consolidated Rail Corporation

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 238-2000

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No. 82-1555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

v.

CONSOLIDATED RAIL CORPORATION,

Appellee

On Appeal From the United States Court of Appeals for the Third Circuit

APPELLEE'S MOTION TO AFFIRM

MOTION TO AFFIRM

Appellee Consolidated Rail Corporation (Conrail), moves that the final judgment and decree of the Court of

Appeals be affirmed, pursuant to Rule 16 of the Rules of the Supreme Court of the United States on the ground that it is manifest that the questions on which the decisions of the cause depend are so unsubstantial as not to warrant further argument.

The reasons in support of this position are stated in the argument in support of this motion, which follows.

STATEMENT

This is an appeal from the final judgment entered by the Court of Appeals for the Third Circuit on November 16, 1982, affirming the judgment of the District Court for the Eastern District of Pennsylvania, 537 F.Supp. 653 (1982). The Court of Appeals judgment is reported without opinion at 696 F.2d 981 (1982). The District Court held that a Pennsylvania statute requiring the installation and use of speedometers and speed recorders on certain locomotives was preempted by the Boiler Inspection Act, 45 U.S.C. §23 , by the Federal Railroad Safety Act, 45 U.S.C. §434, (FRSA) and by regulations issued by the Federal Railroad Administration thereunder, and in light of the Supremacy Clause of the United States Constitution, Article VI, Clause 2.

In 1972, the Pennsylvania Legislature enacted a requirement that locomotives be equipped either with speedometers or speed recorders. Speedometers display current speed to the engineer. Speed recorders are devices which make a taped record of locomotive speed for reference, which can only be observed after the run has ceased. Two years were allowed for compliance with the 1972 law. Pennsylvania Act No. 174 (1972). In 1974, the Federal Railroad Administration (FRA) published an Advanced Notice of Proposed Rulemaking, 39 Fed. Reg. 4929, acting under authority of the Boiler Inspection Act and the FRSA, calling for comments on whether both speedometers and speed recorders should be required on locomotives.

After the FRA's publication of its Advance Notice of Proposed Rulemaking, the Pennsylvania Legislature, in 1975, enacted a law requiring that speed recorders be used on locomotives. Act No. 49 (1975). This new law was codified into the Pennsylvania Consolidated Statutes, 66 Pa.C.S. §2705 (Jurisdictional Statement, Appendix A).

Thereafter, on May 21, 1979, FRA published its Notice of Proposed Rulemaking. FRA then stated that it would require speedometers, but ruled that recorders were not necessary for safety and would be uneconomical, if required. 44 Fed. Reg. 29610-11. Accordingly, the final regulations issued by FRA effective March 30, 1980, 49 C.F.R. §229.117, required only speedometers, but not speed recorders.

Conrail's locomotives, of which it owns some 4,500, are operated mainly in freight service and move in interstate commerce throughout the northeast United States on a pooled basis. In addition, Conrail on occasion operates in Pennsylvania locomotives owned by other carriers in connection with "run-through" operations or other use of such locomotives. The majority of Conrail's locomotives do not have speed recorders, and the cost to Conrail of installation and maintenance of the device was estimated at over $3,000,000.

Conrail brought this action seeking a declaratory judgment and injunction against the enforcement of the Pennsylvania speedometer and speed recorder law. The District Court issued a declaratory judgment which was affirmed by the Court of Appeals.

ARGUMENT

Conrail submits that this appeal is wholly appropriate for disposition by the Court in a summary manner and without argument by affirming the judgments of the lower courts. The "substantial" questions which Appellants seek to present to the Court are indeed unsubstantial. The legal bases which the courts below sustained Conrail's Motion for Summary Judgment and ruled that the Pennsylvania speed recorder statute was preempted by both the Boiler Inspection Act and the Federal Railroad Safety Act (FRSA) are based on clear legal principles which do not require further argument or discussion by this Court.

Conrail will discuss the two questions[1] raised by Appellants and demonstrate that they lack substance to an extent which justifies summary affirmance of the decisions below.

I.

The first question stated by Appellants is as follows:

I. Does the Boiler Inspection Act preempt the States from enforcing legislation requiring devices which are purely experimental in nature?

The phrasing of this question is an effort to avoid the well-established principles set forth in *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

It is significant that the *Napier* case dealt with a factual situation analagous to the present one. In *Napier*, certain state requirements called for fire doors on locomotives on interstate trains and cab curtains on locomotives during the winter months. The Interstate Commerce Commission, which then had power to regu-

1. "Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." Sup.Ct.R. 15.1(a).

late locomotives under the Boiler Inspection Act,[2] had never required a particular kind of fire door or cab curtain. Here the Pennsylvania statute purports to require a device which the FRA, in promulgating its regulations, affirmatively rejected, thus going further than the ICC had in *Napier*. The Court in *Napier* pointed out that the statute precluded any state regulation of equipment on locomotives, since it had occupied the entire field. Justice Brandeis, speaking for the Court, at 272 U.S. 612-613, stated:

> The federal and the state statutes are directed to the same subject — the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribed an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion.
>
> Because the standard set by the Commission must prevail, requirements by the States are precluded, however, commendable or however different their purpose.

---

2. Regulatory authority has been transferred to the Secretary of Transportation. 45 U.S.C. §28; 49 U.S.C. §1655(e)(1)(E).

The reliance by the courts below on this complete preemption doctrine was justified. Subsequent decision of this Court have repeatedly recognized the continuing validity of *Napier* as expressing the governing principle. Most recently in *Maryland v. Louisiana*, 451 U.S. 725 (1981), beginning at page 746, this Court restated the principles underlying the *Napier* case and included citation of that case as an example of an act of Congress which regulates a field in which the federal interest is so dominant as to preclude enforcement of state laws on the same subject:

> The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. See *McCulloch v. Maryland*, 4 Wheat, 316, 427 (1819). See *Hines v. Davidowitz*, 312 U.S. 52 (1941). Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But as the Court stated in *Rice:*
>
> > "Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n.*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of

> state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, [272 U.S. 605]. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538. *Ibid.*

Likewise, in *California v. Taylor*, 353 U.S. 553 (1957), the Court emphasized the preemptive nature of the Railway Labor Act with respect to labor relations in the railroad industry, as opposed to state laws governing labor relations. Further, in footnote 8 on page 560 of the opinion, the Court referred to:

> . . . cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, see *Napier v. Atlantic C. L. R. Co.*, 272 U.S. 605 (Boiler Inspection Act); *Southern R. Co. v. Railroad Commission of Indiana*, 236 U.S. 439 (Safety Appliance Act); *Erie R. Co. v. New York*, 233 U.S. 671 (Hours of Service Act); *Second Employers' Liability Cases*, 223 U.S. 1 (Employers' Liability Act).

In the face of these repeated holdings by this Court, it is apparent that *Napier* is controlling and that the total preemption of locomotive equipment expressed in the Boiler Inspection Act does not require further argument or discussion by this Court.

Appellants seek to avoid the impact of *Napier* by arguing that the speed recorders involved in this case are "purely experimental in nature." It is sufficient to note that this contention completely lacks merit. There is nothing in the record of the case, nor in the Pennsylva-

nia statute requiring speed recorders, which in any way indicates that the requirement is experiemental in nature. Indeed, the contention that there was an experimental aspect was first raised at the appellate level by the Public Utility Commission and was never presented as a consideration during the District Court's handling of the matter. The entire text of 66 Pa.C.S. §2705 is set forth at pages 1a-1b of Appendix A to the Jurisdictional Statement. Examination of that statute will show that there is nothing to indicate that the requirement for speed recorders is experimental. On the contrary, the State apparently had considered the matter and already decided that speed recorders would not be needed in yard switching or commuter passenger service. The statute requires notification by the railroads of compliance with the law, and requires record-keeping. It calls on the Public Utility Commission to enforce the provisions of the statute. Nowhere is there any reference to evaluation of the functioning or use of these devices, nor of any "experimental" basis for the statute. Thus, the attempt by Appellants to distinguish the present case on the stated ground from the general line of preemption cases exemplified in *Napier* and its progeny is wholly unsubstantial.

In fact, the only reference to the purpose or use of speed recorders in the record below is found in the discussion by the FRA in its Notice of Proposed Rulemaking issued in the Federal Register, 44 Fed. Reg. No. 99, p.29610-11, May 21, 1979. In that discussion, FRA in no way indicated any experimental nature of speed recorders:

> . . . At the time of the 1972 survey conducted by the Association of American Railroads in cooperation with the FRA and the Transportation Systems Center, roughly half of the fleet of line locomotives was equipped with speed recorders that were being used on a regular or "casual" basis. Another one-quarter of line locomotives were equipped with devices that were not being utilized. More than 5,000 units

equipped with speed indicators did not have recording capability. FRA inspections of equipped locomotive units have corroborated the view of commenters responding to the advance notice that many recording devices are not in operable condition.

The FRA does not believe that the "state of the art" for locomotive speed recorders has yet progressed to a point at which it is practical to mandate their universal application. More significantly, FRA does not believe that the safety benefits of speed recorders are sufficiently immediate and direct to warrant the expenditures which would be required to equip remaining non-equipped locomotives, repair inoperative units, and conduct periodic maintenance. A conservative estimate of initial costs to complete installation of recorders on the existing road locomotive fleet, including replacement of some existing units, is $7,000,000. Annual maintenance costs and costs associated with the interpretation and storage of data would also be substantial.

Some of the safety benefits which flow from the use of speed recorders can be achieved by other, less costly means. For instance, computations of time between two points can often disclose speed violations. Rotation of motive power on assignments can facilitate the selective use of speed or data recorders to evaluate crew performance. Finally, although speed recorders are helpful in accident investigations, they seldom provide the sole indicium of speed available to the investigator.

Therefore, FRA proposes to terminate the proposals contained in Docket No. LI-4 relating to speed recorders.

Nothing in this discussion indicates that speed recorders were an experimental device. On the contrary, they have been used by many railroads. However, FRA simply de-

cided that they were not required for safety of railroad operations and should not be required on locomotives.

The case of *Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936), referred to by Appellants, does not help their position. That was a personal injury case where a contributing factor to the accident allegedly was the failure of a "watchman" device which had been placed on steam locomotives on an experimental basis. The device was supposed to apply the brakes in the event of an accidental derailment of the locomotive trucks. The Court held there that the liability in the case could not be absolute on the railroad, since the experimental device was not a "part or appurtenance" of the locomotive under the Boiler Inspection Act, and therefore the case did not fall within the general rule that violations of the Boiler Inspection Act in connection with personal injuries give rise to absolute liability on the railraod. *Lilly v. Grand Trunk R.R.*, 317 U.S. 41 (1943). Obviously, *Lunsford* did not involve any question of federal preemption and has no bearing on the continuing authority of the *Napier* case. Appellants may not properly avoid the preemptive principles of both the Boiler Inspection Act and the FRSA by a belated effort to classify the state's requirements as "experimental."

Appellants have not presented a question under their point I which calls for further consideration by this Court. Their contentions are unsubstantial and contrary to settled law.

II.

The second question submitted as a "substantial" issue is stated as follows by Appellants:

II. Has the FRA issued a rule, regulation, order or standard covering the same subject matter as 66 Pa.C.S., §2705?

In this question, Appellants question the finding of the District Court, affirmed by the Court of Appeals, that the federal regulations constituted a "rule, regulation,

order or standard covering the subject matter of such State requirement." Federal Railroad Safety Act, §205, 45 U.S.C. 434. Appellants seek to read this portion of the statute as a restriction against state regulation only if the FRA has acted "relative to the precise subject matter" covered by state regulation, and argue that, since the FRA omitted speed recorders from its regulation, it had not regulated that subject matter.

The argument ignores the fact that the FRA specifically considered and rejected the concept that speed recorders were required on locomotives. It did consider and adopt regulations relating to speedometers (visual indicators of speed). As the Court stated in *Napier*, "the fact that the Commission [FRA] has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power." 272 U.S. 613.

Conrail submits that the action of the FRA in this case obviously dealt with the subject matter of speedometers and speed recording devices on locomotives and that the regulations promulgated by FRA after full consideration at 49 C.F.R., Part 229, §229,117, did constitute regulation of the same subject matter as the State statutory requirements.

In addition, Appellants' argument in its Jurisdictional Statement fails to meet the full scope of the preemptive intention expressed in §205 of the FRSA. When §205 is read as a whole, it overwhelmingly contemplates preemption of the Pennsylvania statute. For convenience, the section reads:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State

> may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. Pub.L. 91-458, Title II, §205, Oct. 16, 1970, 84 Stat. 972.
> 45 U.S.C. §434

While Appellants concentrate only on the issue of whether the "subject matter" of the state requirement has been covered, it is apparent that the courts below considered the application of the FRSA as a whole and set aside the State statute, not only on the basis that the Secretary had adopted a rule covering the subject matter, but also on the other statutory bases. Four other aspects of §205 bear on the decisions below and further develop the preemptive character of the federal Act.

First, the primary policy of the FRSA, as set forth in the first sentence of §205, is that regulations "relating to railroad safety shall be nationally uniform to the extent practical." This general principle is clear and entitled to great weight. Uniformity of locomotive equipment is practical, and indeed necessary, as locomotives are used freely in interstate traffic and run from state to state. The District Court cited with approval comments by J. Friendly that prescription of different safety devices by each state would have a "paralyzing effect." *Opinion*, footnote 14, Jurisdictional Statement, App. B, page 10a.

Second, the FRSA says that a state may only adopt or continue in force additional regulations "when necessary to eliminate or reduce an essentially local safety hazard." There is no reasonable basis to challenge the holding of the lower courts that the Pennsylvania statute did not deal with an essentially local safety hazard. As the court indicated, there is nothing "local" in the words of the statute. *Opinion*, Jurisdictional Statement, App. B,

p. 13a. Nor can there be anything local in the operation of a locomotive over railroad lines which run into adjacent states and beyond and over the Northeast Corridor railroad system. The courts below correctly held that the statewide requirement of speed recorders was obviously not addressed to a "local" hazard.

Third, the FRSA provides that State regulations must not be "incompatible" with any federal law or regulation. The Court met this test by holding that the Pennsylvania speed recorder requirement was obviously incompatible with a federal regulation which specifically had decided that those items are not necessary on locomotives.

Finally, the state regulations must not be a burden on interstate commerce. Appellants made no effort to meet this test, nor did the courts below reach the point.

Consequently, the limited issue raised by Appellants as to whether the reference to "subject matter" in the Federal Railroad Safety Act was intended to apply to each individual item of equipment which might be placed in a locomotive, as opposed to a more general regulation of equipment and appurtenances on locomotives, does not present an issue which needs detailed consideration by this Court. Appellants limit their question to one phrase in the FRSA. The courts below considered Section 205 as a whole and clearly reached a correct result. In any event, their construction of the phrase "subject matter" does not call for further consideration.

CONCLUSION

Conrail submits that Appellants have failed to present questions of such substance as to call for further briefing and argument. The opinion of the District Court is comprehensive and correct. Appellants, in their questions presented, do not challenge the principal bases of the judgments below, but concentrate on an unsupported argument that the Pennsylvania statute was merely "experimental," and on a single narrow aspect of the Court's application of the FRSA, whereas the judgments were based on other aspects of §205 of FRSA which are not questioned by Appellants.

The judgments below conform to the preemption principles established by prior decisions of this Court. There is no conflict shown with the decisions of this Court, nor with the decisions of any other courts of appeal.

The issues are limited to a state statute which, so far as the record shows, exists in no other states. The matter, therefore, is not of general interest in the application of federal law.

Therefore, this Court should affirm the decisions of the courts below without further consideration.

Respectfully submitted,

Hermon M. Wells
John R. Jenchura
1138 Six Penn Center
Philadelphia, Pa. 19104
(215) 977-5019

Counsel for Appellee,
Consolidated Rail
Corporation

CERTIFICATE OF SERVICE

I hereby certify that I served three copies of Appellee's "Motion to Affirm" on Appellants herein by First Class Mail, postage prepaid, on April 11, 1983, addressed to:

John J. Gallagher, Esq.
Charles F. Hoffman, Esq.
G-28 North Office Bldg.
Box 3265
Harrisburg, Pa. 17120

Service was also made in the same manner on *amicus* in the Court of Appeals, addressed to:

T. P. Shearer, Esq.
711 Frick Building
Pittsburgh, Pa. 15219

Hermon M. Wells

APPENDIX A

Listing Pursuant to Supreme Court Rule 28.1

Consolidated Rail Corporation has no parent company. It has the following:

Majority-Owned Subsidiaries
Buffalo Creek Railroad Company
Calumet Western Railway Company
Canada Southern Railway Company
Conrail Equity Corporation
Detroit River Tunnel Company
Detroit Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Merchants Despatch Transportation Corporation
Niagara River Bridge Company
Pennsylvania Car Leasing Company
Penn Central Communications Company
Pennsylvania Truck Lines, Inc.
St. Lawrence & Adirondack Railway Company

Affiliated Companies
Akron & Barberton Belt Railroad Company
Albany Port Railroad Corporation
Belt Railway Company of Chicago
Chicago and Western Indiana Railway Company
Fruit Growers Express Company
Illinois Terminal Railroad Company
Lake Erie and Eastern Railroad Company
Lakefront Dock & Railroad Terminal Company
Monogahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria and Pekin Union Railway Co.
Pittsburgh, Chartiers & Youghiogheny Railway Company

Terminal Railroad Association of St. Louis
Toledo Terminal Railroad Company
Trailer Train Company
    Calpro Company
    Delpro Company
    Hamburg Industries, Inc.
    Railbox Company

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FILED
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No. 82-1555

IN THE

Supreme Court of the United States

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G. individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

vs.

CONSOLIDATED RAIL CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

---

711 Frick Building
Pittsburgh, PA 15219
(412) 391-9707

THOMAS P. SHEARER
Counsel of Record
Attorney for Pennsylvania State Legislative Board, United Transportation Union

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTION PRESENTED

Did the Federal Railroad Safety Act modify the preemptive effect of the Locomotive Inspection Act?

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IN THE

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PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G. individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

vs.

CONSOLIDATED RAIL CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF THE AMICUS CURIAE

The Pennsylvania State Legislative Board, United Transportation Union (State Board) files this brief in support of the Jurisdictional Statement filed by the Pennsylvania Public Utility Commission.

The Pennsylvania State Legislative Board is that arm of the United Transportation Union, itself an international labor organization representing railroad operating personnel, which is peculiarly responsible for the efficacy of Pennsylvania law in achieving the maximum degree of safety which can reasonably be provided by such state law for the members which it represents.

The State Board was instrumental in securing the enactment of legislation by Pennsylvania in 1972 requiring that railroads provide speed indicators and in 1975 of legislation requiring speed recorders. These Acts were codified by the Legislature as 66 Pa. C.S. § 2705 in 1978 as set forth in the Jurisdictional Statement, Appendix A, 1a.

The voluntary use of both of these devices by American railroads is certainly not abnormal. The State Board was pleased when the Federal Railroad Administration (FRA) adopted a regulation requiring speed indicators as it was nationwide in scope. The State Board still believed that speed recorders provided an important method of monitoring the speed of railroad trains. The speed restrictions imposed by rail management are imposed for good and sufficient reason and State Board believes that the observance of such regulations by employees operating the engines is essential to the enhancement of safety. The most effective way of checking speed and enforcing specific limitations is by the use of the speed recorder.

The State Board is not privy to the thinking of the FRA when it deemed speed recorders as experimental devices but it had been able to convince the Senate and House of Pennsylvania of their value in accident prevention. Compliance with the Pennsylvania law by railroads operating in Pennsylvania was complete except for Consolidated Rail Corporation (ConRail). ConRail chose instead to in-

stitute this action in a federal court seeking and obtaining a declaratory judgment. The effect of this judgment is to allow ConRail to operate engines in Pennsylvania without speed recorders even though many had been so equipped at one time. The State Board believes that the Commonwealth of Pennsylvania should be permitted to require speed recorders and that such was the intent of Congress when it passed the Federal Railroad Safety Act in 1970.

The State Board files this Amicus Curiae brief not only in support of the position taken by the Pennsylvania Public Utility Commission but also to urge that the answer to the second question posed by the Commission necessarily depends upon the correctness of the District Court's finding "that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total preemptive effect of the Locomotive Inspection Act," Jurisdictional Statement, 10a.

ARGUMENT

The Federal Railroad Safety Act modified the preemptive effect of the Locomotive Inspection Act.

Initially, it is noted that the Federal Railroad Safety Act's Section 205 (45 U.S.C. § 434) reproduced in the Jurisdictional Statement p. 6, which sets forth the new rules relative to preemption is clear and unambiguous. This being the case resort to legislative history to determine the intent of Congress not only is unnecessary but improper. *Rubin v. U.S.*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed2d 633 (1981); *Howe v. Smith*, 452 U.S. 473, 101 S.Ct. 2468, 69 L.Ed2d 171 (1981).

The State Board subscribes to this view but the lower Court found that the Federal Railroad Safety Act (FRSA) is in fact ambiguous as to its application to railroad safety

legislation existing at the time of its passage. Although the FRSA's statements as to the preemptive effect of federal regulation seem clear and unambiguous to many, State Board will resort to an analysis of legislative history as it has become apparent that others find the FRSA ambiguous.

ConRail argues that the FRSA of 1970, 45 U.S.C. 434, was intended to make no change in the preemptive effect of the Locomotive Inspection Act (LIA) 45 U.S.C. 23. In accepting such assertion the decision below quotes the House Report which does indeed state that the "committee chose to continue them [selected railroad safety laws including the L.I.A.] without change." (H.R. p. 4105)*

The State Board certainly does not contend that the LIA was repealed by the FRSA or that it does not provide the authority for further and new federal regulation of locomotive appurtenances as was indeed the case with regard speed indicators. State Board does contend that statements to the effect that prior safety acts would remain unchanged must be read in the context of the development of the final version of the FRSA.

At the time the FRSA was being formulated, the Administration, specifically Secretary of Transportation James M. Beggs, advocated that all the existing rail safety statutes be repealed and supplanted by regulations (S.R. p. 16). Rail labor opposed such repeal feeling that the regulations to be adopted by the Secretary would not be conducive to safety as the mandatory requirements of the existing acts.

Note: * References herein to H.R. refer to the Report of the Committee of the House of Representatives on S.1933 which became the FRSA. The Report is No. 91-1194 and is reprinted in 1970 U.S. Code Cong. and Adm. News 4104, 4108. Page references are to the reprint. Similarly, the Senate Report No. 91-619 is cited as S.R. Page references are to the original report.

That is why Senator Winston Prouty stated in introducing the FRSA (then S. 1933) that several obsolete safety laws were repealed but the LIA and others proposed for repeal by the Administration and by him (Senator Prouty) were left in. (Cong. Rec. Senate, December 19, 1969, p. 40204.)

In its successful effort to achieve a Bill with unanimous support, Congress yielded to the concern of the railroad unions that if the existing status were repealed and incorporated as regulations the statutory standards might be relaxed by the Secretary (Committee hearings, S. 1933, p. 369).

It was for the purpose of reassuring those members of Congress who supported the railroad unions' position that statements were made that acts such as the LIA would continue "unchanged" (Cong. Rec. House, August 7, 1970, p. 27613).

At the same time, however, it seems clear that Congress intended that the FRSA would be supreme in the sense that it would unify federal and state safety regulation. Representative Friedl of Maryland said in the limited debate:

> "It has, in my view, coordinated and combined all the previous safety statutes we have passed over the years." (Cong. Rec. House, August 6, 1970, p. 27615.)"

It is submitted that this is the conclusion to be drawn from the legislative history of the FRSA; namely, that it was intended to be the master federal act coordinating and combining in one regulatory and enforcement format all federal and state effort in the field of railroad safety.

The House Report states the primary purpose of the

FRSA to be the promotion of safety in all areas of railroad operations, to reduce railroad accidents, and to reduce deaths and injuries to persons (H.R. p. 4104).

It is simply not true that the primary purpose of the FRSA was uniform national regulations as indicated by the decision below. This was indeed a goal but the achievement of that goal was secondary to safety. There was a clear recognition of the vital part to be played by the states in the achievement of greater safety of rail operation.

One needs read only the Background and Need for Legislation in the House Report (H.R. p. 4105) to be convinced as to the purpose of the Act. All the emphasis is on safety – none on the need for uniformity.

The House Report gives the history of the role of the States in rail safety. It states that the Task Force recommended that the existing state requirements remain in effect until preempted by Federal Action and that the Department of Transportation followed this recommendation. It goes on to state that the Bill as passed by the Senate adopted these recommendations but it *also permitted the states to regulate in new areas* until preempted.

This important change by the Senate became a part of the final Act. It must be stressed that this approval was adopted in the original committee hearing held by the Senate Committee.

The Senate Report (91-619) also sets forth the purpose of the Bill as being the promotion of safety. This Report goes on to say "The Committee has also made the judgment that the Federal Government, in its effort to provide for greater safety on the Nation's railroads, should enlist the assistance of those states which have the capability and which are willing to join in the effort" (S.R. p. 1).

When the Bill passed by the Senate reached the House, Representative Madden, who introduced it, said:

> "States are authorized to regulate in any area of safety until the Secretary acts." (Cong. Rec. August 6, 1970 p. 27610).

On the same date, Representative Staggers in speaking for the Bill said:

> "As an important adjunct, *for the first time,* the States are clearly given the power to initiate legislation in areas which have not been touched by these [federal regulations] and these state legislative efforts will remain in effect unless and until such time that the federal government institutes its own regulations. *This is an important advance and recognition of state government."* (Cong. Rec. August 6, 1970 p. 27613)

There seems little doubt in the minds of the members of the House that the FRSA was intended to embrace the entire field of railroad safety.

Representative Friedl said:

> *"It has, in my view, coordinated and combined all previous safety statutes we have passed over the years."* (Cong. Rec. August 6, 1970, p. 27615).

No one expressed a contrary view and the Bill passed with a minor amendment, 358-0.

There is, we submit, absolutely no basis for any contention that Congress intended not to change the existing preemptive effect of the LIA for the sake of uniformity. Safety was the primary goal and the states were given an important role to play in regulating in new areas for the first time. One of the new areas was that of locomotive

equipment where state regulation was made possible for the first time.

The State of Washington took advantage of this Congressionally bestowed power and passed an Act requiring spark arrestors on all engines. This Act, the Washington Supreme Court held, was not preempted by the LIA because of the new standards of preemption made a part of the federal-state program for rail safety embraced within the FRSA. *State of Washington v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 79 Wash. 2d 288, 484 P.2d 1146, cert den. 404 U.S. 804, 92 S.Ct. 108, 30 L.Ed2d 36 (1971).

One of the most important of the cases decided after the enactment of Section 205 of the FRSA is *Bessemer & Lake Erie RR Co., et al. v. Pa. Public Util Com.,* 28 Pa. Cmwlth Ct. 461, 368 A.2d 1305 (1977) (hereinafter referred to as *Bessemer II*). Prior to *Bessemer II,* the Supreme Court of Pennsylvania on May 21, 1968, struck down the Public Utility Commission's Amended Rule 16 (requiring flag protection) on the sole issue of preemption by the Federal Block Signal Act, 49 U.S.C. § 26, in a 4-3 decision. *Bessemer & Lake Erie Railroad Company v. Pa. Public Util Com,* 430 Pa. 339, 243 A.2d 358 (1968) cert den. 393 U.S. 959, 895 S.Ct. 614 (1969) (hereinafter referred to as *Bessemer I*). The basis for the Court's finding of preemption in *Bessemer I* was its feeling that the Block Signal Act indicated an intent by Congress to regulate the entire area of train "spacing" both by fixed signals and flagging.

However, after the enactment of the FRSA and relying upon Section 205 thereof, the Commission reinstated Rule 16 in September of 1975. Several months later, the Pennsylvania Legislature passed a law which was substantially similar to Rule 16. Thereafter the railroads sought a

declaratory judgment in an effort to have this law declared invalid and unconstitutional on the basis of preemption under the Block Signal Act and *Bessemer I.* This action became *Bessemer II.*

The railroads' principle argument in *Bessemer II* was that *Bessemer I* still represented good law even after the enactment of the FRSA. The Commonwealth Court disagreed. The Court in *Bessemer II* held that while Act 142 and the Block Signal Act had the same purpose – the prevention of rear end collisions, the Block Signal Act did not "act to oust or displace Act 142." 368 A.2d 1305 at 1311. As the Court stated at page 1308:

> "At the time of the decision in Bessemer, the Supreme Court of Pennsylvania was writing upon a clean slate. Given no clear indication from Congress of their intent as to preemption (as later given in the FRSA), it very properly found the field to have been preempted, using as their authority the words of Justice Holmes, who stated:
>
> > 'When the United States has exercised its exclusive powers over interstate commerce as far as to take possession of the field, the States no more can supplement its requirements than they can annul them.' *Bessemer,* supra, 430 Pa. at 347, 243 A.2d at 362. (Citation omitted.)
>
> "Now, however, with the very clear manifestation of Congress' intent as to preemption in the FRSA, which specifically allows for state participation in the regulation of railroad safety, the preemption argument of the Pennsylvania Court in *Bessemer,* is no longer valid."

Just as the railroad in *Bessemer II* argued that the state law requiring flagging was unconstitutional on the basis of the Block Signal Act and *Bessemer I*, here ConRail argues that the Pennsylvania Act is unconstitutional on the basis of the Locomotive Inspection Act and *Napier v. Atlantic Coast Line RR*, 272 U.S. 605, 47 S.Ct. 297, 71 L.Ed 432 (1962). Therefore, just as the flagging act was allowed to stand until federal regulation covered the same subject matter, so too the Pennsylvania Act requiring speed recorders should be allowed to stand as the Locomotive Inspection Act and the Block Signal Act are on an equal footing vis a vis the FRSA.

Furthermore, absent actual conflict between state and federal regulations, the question of Congressional intent is no longer considered relevant in deciding questions of preemption.

In *Malone v. White Motor Corporation*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed2d 443 (1978), in resolving a question of preemption, it was held that the proper test was *not the intent to preempt* but rather the purpose of Congress in passing the legislation.

This was held to be the "ultimate touchstone." The purpose of Congress in passing the Federal Rail Safety Act was to enhance safety.

Napier was decided in 1926. Since that time many Supreme Court cases have discussed preemption. For example, the *Huron Portland Cement Co. v. City of Detroit, Mich.* 362 U.S. 440 at 443, 80 S.Ct. 813, 51 L.Ed2d 604 (1960) the following appears:

> "In determining whether state regulation has been preempted by federal action the intent to supersede the exercise by the state of its police

> power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, *such intent is not to be implied unless the act of Congress, fairly interpreted, is an actual conflict with* the law of the state."
> (citations omitted, emphasis added)

Accord, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977); *Buck v. California*, 343 U.S. 99, 72 S.Ct. 502, 96 L. Ed 775; reh. den. 343 U.S. 932, 72 S.Ct. 756, 96 L.Ed. 1341 (1952): *Bessemer & Lake Erie. Co. v. Pa. Pub. Util Com.*, II, supra.

There is no federal regulation regarding speed recorders which conflicts with the Act of Pennsylvania and hence there is no conflict in the instant case. The question of Congressional intent being irrelevant under the more recent cases in the absence of actual conflict there is no preemption.

The subject matter of the instant litigation is the placing of speed recorders on engines. There are no federal regulations covering the same subject matter which are in any way inconsistent. Actually, the federal requirement for a speed indicator is very compatible and makes the speed recorder requirement much less expensive and burdensome.

The exercise of federal supremacy is not lightly to be presumed. Nor is it to be presumed that a federal statute was intended to supersede the state's exercise of power unless there is a clear manifestation of intention to do so. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 94 S.Ct. 383 (1973); *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507

(1973); *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 93 S.Ct. 1854 (1973); *Evansville Airport v. Delta Airlines,* 405 U.S. 707, 92 S.Ct. 1349 (1972); cf. *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 94 S.Ct. 1879 (1974); *Fry v. United States,* 421 U.S. 542, 95 S.Ct. 1792 (1975).

These recent cases established that where Congress had not made clear its intention to preempt or where the conflict is only a potential one or peripheral to the purpose of the federal statute, state legislation will be allowed to stand.

The analysis of preemption issues depends primarily on statutory, non-constitutional interpretation.

In *Jones v. Rath Packing Co.,* supra, the path which must be followed to answer this question is outlined. The first inquiry is whether Congress, pursuant to its power to regulate commerce has so occupied the field as to exclude all state action, the inquiry then turns to whether the federal and state laws are in actual conflict. The intent to supersede the exercise by a state of its police power as to matters not covered by federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. Rather such intent is not to be implied unless the act of Congress is in actual conflict with the law of the state. This Court noted in *Rath* that an "actual conflict" occurs only when the state's law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." (*Rath,* 97 S.Ct. at p. 1310).

The requiring of speed recorders neither impairs nor makes impracticable national uniformity of "laws, rules, regulations, orders" or "standards" relating to railroad safety. The Pennsylvania Act provides only that locomotives be equipped with speed recorders. If a lack of

uniformity becomes a problem, the railroads can seek relief from the federal authorities.

SUMMARY OF ARGUMENT AND CONCLUSION

The right of states to promulgate and enforce regulations relative to railroad safety covering any subject not yet regulated by the federal government is preserved by the Federal Railroad Safety Act. It must be concluded that since the enactment of Section 205 of the FRSA, the rule of *Napier*, supra, is of no effect.

Under the new guidelines established by Section 205, states are free to regulate with respect to railway safety where no federal rule or regulation covers the same subject matter. Here the subject matter is speed recorders on locomotives. There is no federal rule or regulation covering this subject matter. Thus, a state law requiring speed recorders on locomotives is of full force and effect under Section 205 despite the *Napier* decision until the appropriate federal authorities regulate the same subject matter.

For the foregoing reasons, this Court should grant plenary review and, reversing the court below, find that Pennsylvania has not been preempted by the Locomotive Inspection Act from requiring speed recorders on locomotives travelling in excess of thirty miles per hour in Pennsylvania.

Respectfully submitted,

THOMAS P. SHEARER
Attorney for Pennsylvania
State Legislative Board,
United Transportation Union

711 Frick Building
Pittsburgh, PA 15219
(412) 391-9707